No. 12,593

IN THE

United States Court of Appeals

For the Ninth Circuit

NELDA SHANAHAN,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY,

Appellee.

Appellee's Memorandum of Authorities To Be Referred to on Oral Argument

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TABLE OF AUTHORITIES CITED

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I.

On pages 33 and 34 of Appellee's brief the rule is stated that, even assuming error in the proceedings, a judgment will not be disturbed unless it appears that there has been a miscarriage of justice, unless it appears that the substantial rights of appellant have been prejudiced. Only Califor-

nia cases are cited in Appellee's brief. The same rule applies in the federal courts.

It is not enough for a party complaining of a judgment to show that there was some irregularity in the proceedings. He must not only show error, but that he was prejudiced by that error. He must show that he was prejudiced in a substantial way.

Section 2111 of the Judicial Code (28 U.S.C.A. § 2111) provides as follows:

> "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

Section 2111 is a re-enactment of section 269 of the old Judicial Code (28 U.S.C.A. § 391). Both sections have been repeatedly applied by the courts.

Further, Rule 61 of the Federal Rules of Civil Procedure provides:

> "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

Rule 61 applies equally to appellate and trial courts.

Kotteakos v. U. S., 328 U.S. 750, 90 L.ed. 1557;

DeSanta v. Nehi Corp., (2d Cir.) 171 F.2d 696;
Gutshall v. Wood, (C.A. for Dist. Col., 1941) 123 F.2d 174.

Before a judgment will be disturbed, prejudice must be shown.

Horning v. Dist. of Columbia, 254 U.S. 135, 65 L.ed. 185 (1920);
Carlisle Packing Co. v. Sandanger, 259 U.S. 255, 66 L.ed. 927 (1922);
Palmer v. Hoffman, 318 U.S. 109, 116, 87 L.ed. 645, 651 (1943);
U. S. v. Crescent Amusement Co., 323 U.S. 173, 184, 89 L.ed. 160, 169 (1944);
Shuman v. U. S. (5th Cir. 1927), 16 F.2d 457;
Nash v. U. S. (2d Cir. 1932), 54 F.2d 1006, cert. den. 285 U.S. 556, 76 L.ed. 945;
U. S. v. Parker (3d Cir. 1939), 103 F.2d 857, cert. den. 307 U.S. 642, 83 L.ed. 1522;
Lumberman's Mutual Casualty Co. of Ill. v. Timms & Howard, Inc. (2d Cir. 1939), 108 F.2d 497;
Daybrough v. Ware (6th Cir. 1940), 111 F.2d 548;
U. S. v. Monjar (3d Cir. 1945), 147 F.2d 916, 924, cert. den. 325 U.S. 859, 89 L.ed. 1979.

Appellant has the burden of showing prejudice. Even assuming error, prejudice will not be presumed, the presumption is the other way. "He who seeks to have a judgment set aside because of an erroneous ruling has the burden of showing that prejudice resulted." (*Palmer v. Hoffman,* supra.)

See also:

Berger v. U. S. 295 U.S. 77, 81, 82, 79 L.ed. 1314, 1318 (1935);

Daybrough v. Ware, supra.

The rule has been applied in cases of error in the admission of evidence (*U. S. v. Crescent Amusement Co.,* supra.), error in the exclusion of evidence (*Lumberman's Mutual Casualty Co. of Ill. v. Timms & Howard, Inc.,* supra), and error in instructions (*Fraser v. Howell,* (C.A. for Dist. Col., 1950) 182 F.2d 703).

The above citation of cases is in no sense exhaustive. The cases applying the "harmless error" doctrine are far too numerous to list here. The rule and its application to this case cannot be disputed.

II.

Appellant argues that at the time of the accident the wig-wag signal at the crossing was not operating. The only evidence produced by appellant on this issue was the testimony of Hewes and DeRosa. At pages 52 and 53 of appellant's brief it is argued that this testimony of Hewes and DeRosa could have no probative value. If a witness sees a wig-wag signal he could say whether or not it was working. To say merely that he did not see it working means only that he did not see it *at all.* Squarely so holding is *Spreitler v. Louisville & N. R. Co.* (7th Cir. 1942), 125 F.2d 115, which involved a crossing accident and was a death case. The issue was whether or not the wig-wag signal at the crossing was operating at the time of the accident. Plaintiff called as a witness one Fournie who testified that he did not see the signal working, but that he could not say whether it was working or not. The court said at page 117:

"In the case at bar, the witness, Fournie, testified he was looking for the signal. He had to look through a hole left by snow that had sliped off the windshield, and he had to stoop down to look up to try and see the wigwag signal. Under such circumstances, if he had said the wigwag signal was not working, his testimony would have been sufficient to go to the jury and to support the verdict if one were returned by the jury. But Fournie did not say that. All he would say, in effect, was: 'I did not see it working. I would not say it wasn't working. I simply say I didn't see it working.' We submit that such an equivocal statement is no evidence at all that the signal was not working. It is only evidence that he did not see.

"The record speaks positively that Fournie saw nothing. How can testimony that he saw nothing be tortured into testimony that he saw something and the something was not working? No one disputes the fact that the signal was there beside the road and had been located there for over two years. Fournie never testified that he saw the signal on this occasion, although everyone admits it was there. Was the signal working or not working? That was the question. How could it be said from Fournie's testimony that the signal was not working, when there is no evidence he saw the signal at all? He did not say it wasn't working. He expressly declined to say so. When asked if he would say it was not working, he said: 'No * * * I wouldn't say that.'

"There was positive testimony by the engineer and brakeman that they saw the wigwag signal and it was working. That positive testimony is in no manner contradicted by or is it in conflict with Fournie's statement that he saw nothing. Since there was no conflict of evidence, there was nothing for a jury to resolve. Since Fournie saw nothing, the jury would be unwar-

ranted in finding that he saw something. The plaintiff had to rely and did rely solely on Fournie's testimony which, in our opinion, proved nothing. Therefore, there was a total failure of proof on the part of the plaintiff to prove the negligence alleged, and the motion for a directed verdict should have been sustained."

Respectfully submitted

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(Appendix follows)

Appendix

In a number of instances of cases cited in Appellee's brief, only the official citation of the case was given, and the parallel Reporter System citation was inadvertently omitted. The following is a list of those cases, with both the official and parallel citation. The page number indicated opposite the case refers to the page on which the case appears in Appellee's brief.